

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD



HERMAN GUERRERO,
Charging Party,

v.

COUNTY OF SANTA CLARA,
Respondent.

Case No. SF-CE-1033-M

Administrative Appeal

PERB Order No. Ad-412-M

April 21, 2014

Appearance: Herman Guerrero, on his own behalf.

Before Martinez, Chair; Winslow and Banks, Members.

DECISION

MARTINEZ, Chair: This case is before the Public Employment Relations Board (PERB or Board) on appeal by Herman Guerrero (Guerrero) of an administrative decision by the PERB Appeals Assistant finding that Guerrero's appeal of the dismissal of his unfair practice charge was untimely. PERB Regulation 32136¹ provides that the Board may excuse a late filing for good cause. For the reasons set forth below, we do not find good cause to accept Guerrero's late-filed appeal.

PROCEDURAL HISTORY

On February 8, 2013, Guerrero filed an unfair practice charge alleging that the County of Santa Clara (County) violated the Meyers-Milias-Brown Act (MMBA)² by retaliating against him for engaging in protected activity. On April 17, 2013, Guerrero attempted to file

¹ PERB Regulations are codified at California Code of Regulations, title 8, section 31001 et seq.

² The MMBA is codified at Government Code section 3500 et seq.

an amended charge, but the filing was not in accord with PERB Regulation 32615³ because there was no original, no signature under penalty of perjury and no completed proof of service form showing that the County was served with a copy of the charge. A “Filing Deficiency Letter” was sent to Guerrero on April 26, 2013, by the Office of the General Counsel. On May 1 and May 6, 2013, Guerrero attempted to file amended charges.

On May 21, 2013, the Office of the General Counsel issued a warning letter, which noted that neither the May 1 or May 6 deficient attempted filings would be considered because they were not accompanied by a proof of service showing that the County was served with a copy. After analyzing the allegations contained in the initial charge only, the Office of the General Counsel found that the charge failed to state a prima facie case. Guerrero was invited to amend his charge to correct any factual inaccuracies contained in the warning letter and/or provide additional facts to correct the charge deficiencies outlined in the warning letter.

Guerrero filed a first amended charge on May 30, 2013. On December 26, 2013, the Office of the General Counsel issued a dismissal letter finding that the charge, as amended, still did not set forth a prima facie case. Guerrero was informed that he had 20 days within which to appeal the dismissal.

On January 23, 2014, Guerrero filed his appeal. By administrative determination dated January 24, 2014, Guerrero was informed that his appeal was untimely under PERB Regulation 32635, subdivision (a), which requires that an appeal be filed within 20 days of the date of service of the dismissal.⁴ As explained in the administrative determination, the 20th day

³ PERB Regulation 32615 sets forth the requirements for filing an unfair practice charge.

⁴ As also stated in the administrative determination, Guerrero’s appeal was not in accord with other appeal requirements under PERB Regulation 32635, subdivision (a). Guerrero did not sign his appeal nor did Guerrero provide a proof of service showing that the County was served with a copy of his appeal.

for filing the appeal fell on January 15, 2014, but because the dismissal letter was served by mail, the deadline was extended by five days under PERB Regulation 32130, subdivision (c). Because the fifth day fell on January 20, 2014, Martin Luther King, Jr. Day, Guerrero's appeal of the dismissal was due, under PERB Regulation 32130, subdivision (b), by the close of business on January 21, 2014. Guerrero filed his appeal on January 23, 2014, two days late.

On February 5, 2014, Guerrero filed a timely appeal of the administrative determination. Guerrero's appeal states in pertinent part:

Guerrero is aware of the period of time needed to file his appeal.

Unfortunately Guerrero was struck with the flu and was struggling to get the appeal in order, and even had his wife call the appeals office inquiring about the time limit as Guerrero was concerned if the Holiday would work for him or against him.

[¶ . . . ¶]

Moreover, Charging Party would like to request that the Board please reverse its decision, and hopes that it will have understanding as to the Charging Party is not an attorney, neither experienced with the PERB's process, . . .

DISCUSSION

PERB Regulation 32635 governs review of dismissals. Subdivision (a) states in pertinent part:

Within 20 days of the date of service of a dismissal, the charging party may appeal the dismissal to the Board itself. The original appeal and five copies shall be filed in writing with the Board itself in the headquarters office, and shall be signed by the charging party or its agent. Service and proof of service of the appeal on the respondent pursuant to Section 32140 are required.

Guerrero's appeal of the dismissal was not signed, nor was it accompanied by a proof of service form showing that the County was served with a copy of the appeal. And, relevant to the immediate issue in this case, the appeal was not filed within 20 days of service of the

dismissal. Even were the Board to find good cause to excuse the lateness issue, the other deficiencies with the appeal are equally problematic.⁵

Good cause, however, does not exist under these facts. PERB Regulation 32136 provides:

A late filing may be excused in the discretion of the Board for good cause only. A late filing which has been excused becomes a timely filing under these regulations.

The Board has found good cause to exist where the explanation for the delay was “reasonable and credible.” (*Barstow Unified School District* (1996) PERB Order No. Ad-277 (*Barstow*)). The party’s explanation must be credible on its face or corroborated by other facts. (*Ibid.*) The Board has also found good cause to exist for “honest mistakes” such as certain types of mailing or clerical errors. (*Ibid.*) Good cause exists only where a short delay results from circumstances beyond the control of the filing party or from excusable misinformation, and where the filing party has made “a conscientious effort to timely file.” (*United Teachers of Los Angeles (Kestin)* (2003) PERB Order No. Ad-325.) Only where the explanation satisfies these conditions does the Board then evaluate whether permitting a late filing would be prejudicial to the opposing party. (*Barstow, supra*, PERB Order No. Ad-277.)

When a late filing is caused by an alleged illness, the party must still demonstrate a conscientious effort to timely file and explain how an illness precluded timely filing. (*AFT College Staff Guild, Local 1521 (Mrvichin)* (2005) PERB Order No. Ad-349;

⁵ The service requirements are not merely ritualistic, but are basic to providing due process to the involved parties. (*Los Angeles Community College District* (1984) PERB Decision No. 395.) The lateness of Guerrero’s appeal of the dismissal is the only issue in this administrative appeal. The appeal itself is not before us. Therefore, we do not reach the merits of the case. Neither do we reach the issue whether any of the other procedural deficiencies with the appeal, i.e., lack of proof of service and lack of signature, would warrant denial of the appeal on either or both of those bases alone.

Newport-Mesa Unified School District (2008) PERB Order No. Ad-373.) In *State of California (Department of Social Services)* (2001) PERB Order No. Ad-308-S, the filing party claimed to be “seriously ill . . . and thus unable to appeal timely.” A doctor visit verification form indicated that the party was unable to work for a specified period of time. Although the party submitted proof of his illness, the Board found he did not explain how the illness prevented him from making a conscientious effort to timely file. (See also *State of California (State Teachers Retirement System)* (1999) PERB Order No. Ad-296-S [party’s attorney did not explain how his illness affected his ability to timely file]; *State of California* (2001) PERB Order No. Ad-309-S [party did not explain how depression and anxiety prevented a timely filing]; *North Monterey County Unified School District* (1996) PERB Order No. Ad-274 [party did not explain how family illness prevented a timely filing].)

Here, Guerrero stated he had the flu and that his wife called the appeals office to inquire about the deadline for filing the appeal.⁶ Guerrero admits that he was “aware of the period of time needed to file his appeal” and yet fails to explain how his flu or his wife’s inquiry prevented him from timely filing his appeal or timely requesting an extension of time under PERB Regulation 32132, as described in the dismissal letter. Therefore, good cause does not exist to excuse Guerrero’s late-filed appeal of the dismissal of his unfair practice charge.

⁶ Guerrero also appeals to the Board’s sympathy, claiming that he is not an attorney and is inexperienced with PERB’s process. Generally, these types of issues do not affect the Board’s consideration of good cause. (See, e.g., *Public Employees Union Local 1 (Coleman)* (2005) PERB Decision No. 1780-M.)

ORDER

The Public Employment Relations Board's (Board) denial of Herman Guerrero's (Guerrero) appeal of the dismissal of his unfair practice charge in Case No. SF-CE-1033-M as untimely is AFFIRMED. Guerrero's request that the Board excuse his late-filed appeal for good cause is hereby DENIED.

Members Winslow and Banks joined in this Decision.